Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

14 March 2019*

(Reference for a preliminary ruling — Social security systems — Invalidity benefits — Articles 45 and 48 TFEU — Freedom of movement for workers — Regulation (EC) No 883/2004 — Different benefit schemes in the Member States — 'Primary period of incapacity to work' — Duration — Benefits for incapacity for work — Disadvantages for migrant workers)

In Case C-134/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the arbeidsrechtbank Antwerpen (Labour Court, Antwerp, Belgium), made by decision of 8 February 2018, received at the Court on 19 February 2018, in the proceedings

Maria Vester

v

Rijksinstituut voor ziekte- en invaliditeitsverzekering,

THE COURT (Eighth Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, J. Malenovský and L.S. Rossi, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ms Vester, by D. Volders, advocaat,

– the Belgian Government, by M. Jacobs, L. Van den Broeck and C. Pochet, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,

– the European Commission, by D. Martin and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 45 and 48 TFEU, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1) and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1).

2 The request has been made in proceedings between Ms Maria Vester and the Rijksinstituut voor ziekte- en invaliditeitsverzekering (National Institute for Health and Disability Insurance: 'NIHDI') concerning the refusal by the latter to grant Ms Vester invalidity benefit.

Legal context

European Union law

Regulation No 883/2004

3 Title I of Regulation No 883/2004, entitled 'General provisions', contains Article 6, which provides:

'Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

– the acquisition, retention, duration or recovery of the right to benefits,

…

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.'

4 Title II of Regulation No 883/2004, entitled 'Determination of the legislation applicable', includes Article 11(3)(c), which provides:

'Subject to Articles 12 to 16:

…

(c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State'.

5 Chapter 5, entitled 'Old-age and survivors' pensions', under Title III of Regulation No 883/2004, includes Articles 50 to 60.

6 Article 51 thereof, entitled 'Special provisions on aggregation of periods', provides in paragraphs 1 and 2:

'1. Where the legislation of a Member State makes the granting of certain benefits conditional upon the periods of insurance having been completed only in a specific activity as an employed or self-employed person or in an occupation which is subject to a special scheme for employed or self-employed persons, the competent institution of that Member State shall take into account periods

completed under the legislation of other Member States only if completed under a corresponding scheme or, failing that, in the same occupation, or where appropriate, in the same activity as an employed or self-employed person.

If, account having been taken of the periods thus completed, the person concerned does not satisfy the conditions for receipt of the benefits of a special scheme, these periods shall be taken into account for the purposes of providing the benefits of the general scheme or, failing that, of the scheme applicable to manual or clerical workers, as the case may be, provided that the person concerned had been affiliated to one or other of those schemes.

2. The periods of insurance completed under a special scheme of a Member State shall be taken into account for the purposes of providing the benefits of the general scheme or, failing that, of the scheme applicable to manual or clerical workers, as the case may be, of another Member State, provided that the person concerned had been affiliated to one or other of those schemes, even if those periods have already been taken into account in the latter Member State under a special scheme.'

7 Article 52 of that regulation, entitled 'Award of benefits', provides in paragraph 1:

'1. The competent institution shall calculate the amount of the benefit that would be due:

(a) under the legislation it applies, only where the conditions for entitlement to benefits have been satisfied exclusively under national law (independent benefit);

(b) by calculating a theoretical amount and subsequently an actual amount (pro rata benefit), as follows:
   (i) the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance and/or of residence which have been completed under the legislations of the other Member States had been completed under the legislation it applies on the date of the award of the benefit. If, under this legislation, the amount does not depend on the duration of the periods completed, that amount shall be regarded as being the theoretical amount;
   (ii) the competent institution shall then establish the actual amount of the pro rata benefit by applying to the theoretical amount the ratio between the duration of the periods completed before materialisation of the risk under the legislation it applies and the total duration of the periods completed before materialisation of the risk under the legislations of all the Member States concerned.'

8 Article 57 of that regulation, entitled 'Periods of insurance or residence of less than one year', provides in paragraph 1:

'Notwithstanding Article 52(1)(b), the institution of a Member State shall not be required to provide benefits in respect of periods completed under the legislation it applies which are taken into account when the risk materialises, if:

– the duration of the said periods is less than one year,

and

– taking only these periods into account no right to benefit is acquired under that legislation.

For the purposes of this Article, "periods" shall mean all periods of insurance, employment, self-employment or residence which either qualify for, or directly increase, the benefit concerned.'

9 Article 65 of Regulation No 883/2004, entitled 'Unemployed persons who resided in a Member State other than the competent State', provides, in paragraphs 2, first sentence, and 5(a) thereof:

'2. A wholly unemployed person who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself/herself available to the employment services in the Member State of residence. …

…

5. (a) The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he/she had been subject to that legislation during his/her last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.'

Regulation No 987/2009

10 Regulation No 987/2009, which lays down the procedure for implementing Regulation No 883/2004, lays down, in Chapter IV in Title III, the rules relating to invalidity benefits and old-age and survivors' pensions.

11 Article 45 of Regulation No 987/2009, entitled 'Claim for benefits', provides, in particular:

'A. *Submission of the claim for benefits under type A legislation under Article 44(2) of [Regulation No 883/2004].*

…

B. *Submission of other claims for benefits*

4. In situations other than those referred to in paragraph 1, the claimant shall submit a claim to the institution of his place of residence or to the institution of the last Member State whose legislation was applicable. …

…'

12 Article 47 of Regulation No 987/2009, entitled 'Investigation of claims by the institutions concerned', states inter alia:

'A. *Contact institution*

'1. The institution to which the claim for benefits is submitted or forwarded in accordance with Article 45(1) or (4) of [Regulation No 987/2009] shall be referred to hereinafter as the "contact institution". …

In addition to investigating the claim for benefits under the legislation which it applies, this institution shall, in its capacity as contact institution, promote the exchange of data, the communication of decisions and the operations necessary for the investigation of the claim by the institutions concerned, and supply the claimant, upon request, with any information relevant to the Community aspects of the investigation and keep him/her informed of its progress.

B. *Investigation of claims for benefits under type A legislation under Article 44 of [Regulation No 883/2004]*

…

C. *Investigation of other claims for benefits*

4. In situations other than those referred to in paragraph 2, the contact institution shall, without delay, send claims for benefits and all the documents which it has available and, where appropriate, the relevant documents supplied by the claimant to all the institutions in question so that they can all start the investigation of the claim concurrently. The contact institution shall notify the other institutions of periods of insurance or residence subject to its legislation. It shall also indicate which documents shall be submitted at a later date and supplement the claim as soon as possible.

5. Each of the institutions in question shall notify the contact institution and the other institutions in question, as soon as possible, of the periods of insurance or residence subject to their legislation.

6. Each of the institutions in question shall calculate the amount of benefits in accordance with Article 52 of [Regulation No 883/2004] and shall notify the contact institution and the other institutions concerned of its decision, of the amount of benefits due and of any information required for the purposes of Articles 53 to 55 of [Regulation No 883/2004].

…'

Belgian law

13 Under Article 32 of the Gecoördineerde wet betreffende de verplichte verzekering voor geneeskundige (Coordinated Law on compulsory insurance for medical care and benefits) of 14 July 1994 ('the ZIV Law'), workers who are in 'controlled unemployment' are entitled to health benefits as defined in Chapter III of Title III of that law and under the conditions laid down therein.

14 Article 86(1)(c) of the ZIV Law provides that workers who are in 'controlled unemployment' are also entitled, as claimants, to incapacity benefits as defined in Chapter III of Title IV of that law and under the conditions laid down therein.

15 Article 87 of the ZIV Law states that the claimant referred to in Article 86(1) of that law, who is unfit to work, receives 'primary work incapacity benefits' for each working day for one year, starting from the date on which his incapacity to work begins, or for each day of that period treated as a working day.

16 Under Article 93 of the ZIV Law, where the incapacity to work extends beyond the primary period of incapacity to work, the claimant is to be paid invalidity benefit for each working day of incapacity to work or for each day treated as such.

17 As regards incapacity to work which began before 1 May 2017, Article 128(1) of the ZIV Law provides that, in order to be entitled to the benefits laid down in Title IV of that law, the claimant referred to in Article 86(1) thereof must have completed, in a period of six months prior to the date of entitlement, 120 days of work in accordance with Article 203 of the Koninklijk besluit tot uitvoering van de wet betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen (Royal Decree implementing the Law on compulsory healthcare insurance and benefits) of 3 July 1996 (*Monitor belge* of 31 July 1996, p. 20285), in the version applicable to incapacity to work commencing before 1 May 2017.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 After working in the Netherlands from 10 November 1997 until 31 March 2015, Ms Vester, a Dutch national residing in Belgium received unemployment benefit from the competent Belgian institution from 2 April 2015.

19 On 7 April 2015, Ms Vester notified the Belgian insurance institution that she was unfit for work. Although she did not satisfy the conditions laid down by Belgian law, the competent Belgian institution granted her incapacity benefits, from that day until 6 April 2016 based on the principle of the aggregation of insurance periods laid down in Article 6 of Regulation No 883/2004.

20 On 7 April 2016 Ms Vester acquired invalidity status in Belgium.

21 By letter of 17 May 2016, Ms Vester submitted an application for the payment of invalidity benefits in the Netherlands to the Uitvoeringsinstituut werknemersverzekeringen (Employees Insurance Institute, Netherlands) ('the UWV').

22 In its reply of 19 May 2016, the UWV informed Ms Vester that, under Netherlands law, the acquisition of invalidity status and the payment of the related benefits was possible only after the completion of a 'primary period of incapacity to work' of 104 weeks and, that since she had only completed 52 weeks of the primary period of incapacity to work in Belgium, it could not pay her invalidity benefits, which could be paid only from 4 April 2017.

23 By decision of 18 August 2016, the INAMI informed Ms Vester that, since she had only completed 4 days of insurance in Belgium on the date of her declaration of incapacity to work, which was followed by the grant of her invalidity status, she failed to satisfy the conditions for entitlement to invalidity benefits in Belgium and, therefore, it refused to grant her those benefits on the basis of Article 57 of Regulation No 883/2004. Ms Vester brought an action against that decision before the referring court.

24 On the same day, in accordance with Article 47 of Regulation No 987/2009, the INAMI submitted a claim for benefits to the UWV, which was rejected for the same reasons as those mentioned in paragraph 22 of the present judgment.

25 From 4 April 2017, the date on which Ms Vester completed the 'primary period of incapacity to work' of 104 weeks required by Netherlands law, during which she did not receive invalidity benefits which are, in principle, granted to workers who complete such a period, she was granted invalidity status in the Netherlands and invalidity benefit was paid to her by the competent Netherlands institution.

26 The referring court observes that, by reason of the difference existing between Belgian and Netherlands law regarding the length of the 'primary period of incapacity to work' necessary for the acquisition of invalidity status in Belgium and the Netherlands, Ms Vester did not receive any benefits between 7 April 2016, the date on which the 'primary period of incapacity to work' laid down by Belgian law ended, and 3 April 2017, the date on which the 'primary period of incapacity to work' laid down by Netherlands law ended. That court expresses doubts about the compatibility of such a situation with Articles 45 and 48 TFEU.

27 In those circumstances, the arbeidsrechtbank Antwerpen (Labour Court, Antwerp, Belgium) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 45 and 48 TFEU infringed in the case where the last competent Member State refuses, upon commencement of incapacity for work, after expiry of a waiting period of 52 weeks of incapacity for work, during which sickness benefits were awarded, entitlement to invalidity

benefit on the basis of Article 57 of [Regulation No 883/2004], and the other, previously competent Member State applies, for the examination of the entitlement to a pro-rata invalidity benefit, a 104-week waiting period in accordance with the national law of that Member State?

(2) If that is the case, is it compatible with the right of free movement that the person concerned, during this waiting time gap, is dependent on social assistance, or do Articles 45 and 48 TFEU oblige the previously competent Member State to examine the entitlement to invalidity benefits after expiry of the waiting period under the legislation of the last competent Member State, even if the national law of the previously competent Member State does not permit this?'

Consideration of the questions referred

28 By its questions, which it is appropriate to examine together, the referring court asks essentially whether Articles 45 and 48 TFEU must be interpreted as precluding a situation, such as that at issue in the main proceedings, in which a worker who, after a one-year period of incapacity to work, is granted invalidity status by the competent institution of the Member State in which he resides without being entitled to invalidity benefits on the basis of the legislation of that Member State, is required, by the competent institution of the Member State in which he completed all his insurance periods, to complete an additional one-year period of incapacity to work in order to be granted invalidity status and entitlement to pro-rata invalidity benefits, without, however, receiving any invalidity benefits during that period.

29 In order to give a useful answer to the referring court, it must be recalled, as a preliminary point, that Regulation No 883/2004, the aim of which is to coordinate the disparate national systems, allows different national social security schemes to exist, but does not set up a common scheme of social security. Thus, according to settled case-law, Member States retain the power to organise their own social security schemes (see, by analogy, judgments of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraph 35 and the case-law cited, and of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 38.)

30 Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, in particular, the conditions for entitlement to benefits (judgments of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraph 36 and the case-law cited, and of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 39).

31 In exercising those powers, Member States must nonetheless comply with EU law and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States (judgments of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraph 37 and the case-law cited, and of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 40).

32 In this respect, it must be held that the FEU Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstances. It follows that, even where its application is less favourable, such legislation is still compatible with Articles 45 and 48 TFEU if it does not place the worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return (see, to that effect, judgment of 1 October 2009, *Leyman*, C-3/08, EU:C:2009:595, paragraph 45 and the case-law cited).

33 Thus, the Court has repeatedly held that the aim of Article 45 TFEU would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage European Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (judgment of 1 October 2009, *Leyman*, C-3/08, EU:C:2009:595, paragraph 41 and the case-law cited).

34 In the present case, it is clear from the file before the Court that the Belgian and Netherlands invalidity insurance schemes make the recognition of invalidity status subject to the completion by the worker concerned of a 'primary period of incapacity to work' during which he receives benefits for incapacity to work. It is only on the expiry of that period that the worker concerned acquires invalidity status and receives invalidity benefits. However, the Belgian and Netherlands legislation differ as regards the length of that period, since they provide that that period lasts for one and two years respectively.

35 Therefore, as is apparent from the order for reference, Ms Vester, who, on 7 April 2015, received unemployment benefit under Belgian law and was covered by that law in accordance with Article 11(3) of Regulation No 883/2004, completed a one-year 'primary period of incapacity to work' in Belgium, as provided by that legislation and received benefits for incapacity to work during that period, not on the basis of the insurance periods completed in Belgium, since those were insufficient, but on the basis of the insurance periods completed in the Netherlands, in accordance with the principle of the accumulation of insurance periods laid down in Article 6 of Regulation No 883/2004.

36 At the end of that 'primary period of incapacity to work', the competent Belgian institution granted Ms Vester invalidity status but refused to pay her invalidity benefits.

37 In that connection, it must be recalled that, under Article 57(1) of Regulation No 883/2004, the competent institution of a Member State may refuse to provide benefits in respect of periods completed under the legislation it applies if those periods are less than one year and if, taking only those periods into account no right to benefit is acquired under that legislation.

38 In the present case, it is not disputed that Ms Vester has not paid sufficient contributions in Belgium and could only receive invalidity benefits on the basis of the insurance periods completed in the Netherlands.

39 However, when the Belgian authorities sent to the competent Netherlands institution a claim for invalidity benefits pursuant to Article 47 of Regulation No 987/2009, the latter refused to grant Ms Vester invalidity status or to pay her the related benefits on the ground that she had not completed a two-year period of incapacity to work as provided for by Netherlands legislation.

40 Accordingly, that institution required Ms Vester to complete a second year of the 'primary period of incapacity to work', laid down by Netherlands legislation, but without paying her the related benefits.

41 Although the Netherlands legislation at issue in the main proceedings does not, a priori, make a distinction between migrant and sedentary workers, as it provides, in a general manner, for the transfer to invalidity status at the end of a two-year period of incapacity to work, in practice, during the second year of unfitness to work, it puts migrant workers in a situation such as Ms Vester's at a disadvantage as compared to non-migrant workers and leads the former to lose a social security advantage that that legislation is supposed to provide for them.

42 It is apparent from the order for reference that workers who, unlike Ms Vester, do not exercise their right to freedom of movement and complete the entire period of incapacity to work under Netherlands law, receive benefits for the duration of that period of incapacity to work from the competent Netherlands institution.

43 It is common ground that during the second year of unfitness to work she completed under Netherlands law, Ms Vester did not receive those benefits.

44 In those circumstances, it must be held that the application of the Netherlands law at issue in the main proceedings to a migrant worker in a situation such as Ms Vester's produces effects which are incompatible with the objective of Article 45 TFEU, due to the fact that Ms Vester's right to invalidity benefits was governed consecutively by different legislation.

45 The Court has already held that, where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article 4(3) TEU requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 45 TFEU (see, to that effect, judgment of 1 October 2009, *Leyman* C-3/08, EU:C:2009:595, paragraph 49 and the case-law cited).

46 It must be recalled, in that regard, that, according to settled case-law, where national law, in breach of EU law, provides that a number of groups of persons are to be treated differently, the members of the group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the other persons concerned. The arrangements applicable to members of the group placed at an advantage remain, for want of the correct application of EU law, the only valid point of reference (judgments of 13 July 2016, *Pöpperl*, C-187/15, EU:C:2016:550, paragraph 46 and the case-law cited, and of 28 June 2018, *Crespo Rey*, C-2/17, EU:C:2018:511, paragraph 73).

47 As is apparent from the order for reference and as already stated in paragraph 42 of the present judgment, non-migrant workers who have not exercised their right to freedom of movement and who complete all their period of incapacity to work under Netherlands law, receive benefits for incapacity to work throughout that period. It is therefore that legal framework which is the valid point of reference, within the meaning of the case-law cited in the preceding paragraph.

48 It is true that it is for the competent national authorities of the Member States concerned to determine, under national law, what are the most appropriate means for achieving equal treatment of migrant and non-migrant workers. However, it must be stated that that objective may, a priori, also be achieved by granting migrant workers, in a position such as that at issue in the main proceedings, benefits for incapacity to work during the second year of incapacity to work required of them under Netherlands law.

49 Having regard to all of the foregoing, the answer to the questions referred is that Articles 45 and 48 TFEU must be interpreted as precluding a situation, such as that at issue in the main proceedings, in which a worker who is unfit to work for one year and who has been granted invalidity status by the competent institution of the Member State of his residence, without being entitled to receive invalidity benefits on the basis of the law of that Member State, is required by the competent institution of the Member State in which he completed all his insurance periods to complete an additional one-year period of incapacity to work in order to be granted invalidity status and receive pro-rata invalidity benefits, without receiving any benefits for incapacity to work during that period.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Articles 45 and 48 TFEU must be interpreted as precluding a situation, such as that at issue in the main proceedings, in which a worker who is unfit to work for one year and who has been granted invalidity status by the competent institution of the Member State of his residence, without being entitled to receive invalidity benefits on the basis of the law of that Member State, is required by the competent institution of the Member State in which he completed all his insurance periods to complete an additional one-year period of incapacity to work in order to be granted invalidity status and receive pro-rata invalidity benefits, without receiving any benefits for incapacity to work during that period.

[Signatures]